UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

ASSOCIATED PRESS,	:	**ECF CASE**
	:	
Plaintiff,	:	
	:	
- v.-	:	
	:	05 Civ. 3941 (JSR)
	:	
UNITED STATES DEPARTMENT OF DEFENSE,	:	
	:	
Defendant.	:	

- -x

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR RECONSIDERATION

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ASSOCIATED PRESS, Plaintiff,	:	**ECF CASE**
- v.-	:	05 Civ. 3941 (JSR)
UNITED STATES DEPARTMENT OF DEFENSE, Defendant.	:	

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR RECONSIDERATION OF THE COURT'S AUGUST 29, 2005 ORDER

Preliminary Statement

Defendant, the United States Department of Defense ("DOD"), respectfully submits this memorandum of law in support of its motion for reconsideration pursuant to Local Civil Rule 6.3 and Federal Rule of Civil Procedure 59(e). Specifically, DOD asks that the Court reconsider its August 29, 2005 order directing DOD to poll detainees at the Guantanamo Bay Naval Air Station, Cuba ("Guantanamo") on whether they consent to disclosure to the Associated Press ("AP") of identifying information redacted from the documents DOD has provided to AP in this action under the Freedom of Information Act ("FOIA").

After producing nearly 4,000 pages of transcripts and other documents relating to the Combatant Status Review Tribunals ("CSRTs") held at Guantanamo, DOD moved for summary judgment upholding its redaction from those documents of detainee names and other identifying information, pursuant to FOIA Exemption 6. The motion was fully submitted on July 25, 2005, and the Court heard oral argument on the motion on July 29, 2005. Although not proposed by

AP, at oral argument the Court asked the parties whether it would be appropriate to inquire of the detainees whether they consent to disclosure of their identifying information to AP. At the close of argument, the Court directed the parties to provide the Court with additional submissions setting forth their positions on whether the Guantanamo detainees should be asked whether or not they consent to release of their identifying information to AP, and the parties did so on August 12, 2005. Relying on a detailed declaration setting forth the logistical difficulties and burden on military operations that such a polling requirement would create, DOD opposed any requirement that it obtain the detainees' views on the requested disclosure.

In a memorandum order dated August 29, 2005 (the "Order"), the Court ordered DOD to poll the detainees on whether they consent to disclosure of their identifying information. DOD submits that reconsideration and vacatur of the Order is warranted because the polling procedure ordered by the Court is not contemplated by FOIA and the cases cited by the Court do not support its use. In addition, the directive improperly intrudes on military operations, in disregard of separation of powers principles and the traditional deference courts owe the Executive Branch in military matters.

ARGUMENT

THE COURT SHOULD RECONSIDER ITS ORDER DIRECTING DOD TO POLL GUANTANAMO DETAINEES ON WHETHER THEY CONSENT TO DISCLOSURE OF THEIR IDENTIFYING INFORMATION

Local Civil Rule 6.3 establishes the mechanism for litigants in this District to seek reconsideration through motions "setting forth concisely the matters or controlling decisions which counsel believes the court has overlooked." Local Civil Rule 6.3. A motion for reconsideration or reargument is appropriate when the court has overlooked "controlling decisions or factual matters that were put before it on the underlying motion . . . and which, had they been considered, might have reasonably altered the result before the court." Greenwald v. Orb Communications, Inc., No. 00 Civ. 1939, 2003 WL 660844, at *1 (S.D.N.Y. Feb. 27, 2003) (quoting Range Road Music, Inc. v. Music Sales Corp., 90 F. Supp. 2d 390, 392 (S.D.N.Y. 2000) (internal quotation marks and citation omitted)). "Local Rule 6.3 does not invite reargument of issues that have been considered fully by the court[, n]or does a motion under Rule 6.3 serve as a vehicle in which to advance arguments that the movant failed to make on the underlying motion." Mukaddam v. Permanent Mission of Saudi Arabia to the U.N., No. 99 Civ. 3354, 2001 WL 303734, at *1 (S.D.N.Y. March 27, 2001). At the same time, however, a motion for reconsideration or reargument may be granted to "correct a clear error or prevent manifest injustice." Id. (quoting Griffin Indus., Inc. v. Petrojam, Ltd., 72 F. Supp. 2d 365, 368 (S.D.N.Y. 1999)).

A. FOIA Does Not Contemplate the Mandatory Polling Ordered by the Court

In the Order, the Court directed DOD to ask Guantanamo detainees "whether they wish the redacted information relating to their identities to be released to the Associated Press." Order at 3. In the Court's view, polling the detainees on whether they consent to disclosure is "critical to an informed evaluation" of the privacy and public interests that must be balanced in determining whether disclosure is warranted under Exemption 6. Order at 3. In deeming the detainees' views "critical" to performing the balancing test it acknowledged Exemption 6 requires, the Court disregarded the nature of the analysis required by FOIA and that exemption, which is to weigh the submissions of the parties and either order disclosure or affirm the agency's withholding, not to impose new obligations on DOD that are entirely absent from the "carefully balanced scheme of public rights and agency obligations" that Congress enacted. Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 150 (1980).

Under Exemption 6, documents and information are properly withheld where disclosure would "constitute a clearly unwarranted invasion of personal privacy," 5 U.S.C. § 552(b)(6), which is determined by balancing the public interest in disclosure against the privacy interests that would be furthered by non-disclosure. See, e.g., Department of the Air Force v. Rose, 425 U.S. 352, 372 (1976). As with any FOIA exemption, the determination whether the information is exempt from disclosure is properly made based on the affidavits before the court. See, e.g., Carney v. United States Dep't of Justice, 19 F.3d 807, 812 (2d Cir.) (affidavits "supplying facts indicating that the agency has conducted a thorough search and giving reasonably detailed explanations why any withheld documents fall within an exemption are sufficient to sustain the agency's burden"), cert. denied, 513 U.S. 823 (1994); McDonnell v. United States, 4 F.3d 1227, 1241 (3d Cir. 1993) (agency may use affidavits to meet its burden of justifying withholding of records; "[t]he significance of agency affidavits in a FOIA case cannot be underestimated") (Exemptions 1, 3, 6, 7(C)); Center for Auto Safety v. Environmental Protection Agency, 731 F.2d 16, 20 (D.C. Cir. 1984) (legislative history for 1974 FOIA amendments states that government should be allowed to "establish by means of testimony or detailed affidavits that the documents are clearly exempt from disclosure" before in camera inspection is ordered); Hemenway v. Hughes, 601 F. Supp. 1002, 1004 (D.D.C. 1985) (recognizing that in FOIA cases, summary judgment hinges on whether agency affidavits are reasonably specific, demonstrate logical use of exemptions, and are not controverted by evidence in record or by bad faith) (Exemption 6). If the agency's affidavits establish that the records at issue were properly withheld, summary judgment is appropriate. See, e.g., Alyeska Pipeline Serv. Co. v. U.S. Environmental Protection Agency, 856 F.2d 309, 315 (D.C. Cir. 1988). If they do not, then the court may order disclosure. See, e.g., Kamman v. United States Internal Revenue Serv., 56 F.3d 46, 49 (9th Cir. 1995).

The Court erred in rejecting this legal framework in favor of a mandatory polling procedure in which the government is required to elicit the views on disclosure of the subjects of particular records – views the court mistakenly perceives as "critical" even though FOIA imposes no duty on the government to offer them to justify withholding under Exemption 6 and does not require the subjects of the information to participate in the suit. The Court's determination that mandatory polling is appropriate because the subjects of the FOIA request are in government "custody," Order at 3, is also devoid of support in FOIA or the case law. Yet it creates a standard of potentially unlimited application given the thousands of individuals in government custody in and outside of the United States, while inviting other courts to devise additional new obligations that they believe appropriate in the "unusual circumstances" of the cases before them. Order at 4 n. 1. Cf. Weinberger v. Catholic Action of Hawaii, 454 U.S. 139, 145 (1981) (court of appeals "should have accepted the balance struck by Congress, rather than engrafting onto the statutory language unique concepts of its own making") (interpreting FOIA and NEPA).

Equally fundamental, the Court's reliance on the particular views of individual detainees to perform the Exemption 6 analysis overlooks well-settled case law directing that FOIA exemptions be applied based on categorical assessments of the documents or information at issue. See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 778, 780 (1989) (whether disclosure of law enforcement information about an individual could constitute an unwarranted invasion of privacy under Exemption 7(C) should be assessed "as a categorical matter" "without regard to individual circumstances"); id. at 776 (noting that NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978), held "entire category of NLRB witness statements" properly withheld under Exemption 7(A), over argument that statute required statement-by-statement determination); Federal Trade Comm'n v. Grolier, Inc., 462 U.S. 19, 27-28 (1983) (court of appeals erred in undertaking document-by-document assessment of whether documents at issue were covered by work product doctrine and thus exempt from disclosure under Exemption 5; holding all documents exempt even if some might be found unprotected by work product, because "[o]nly by construing [Exemption 5] to provide a categorical rule can [FOIA's] purpose of expediting disclosure by means of workable rules be furthered"); see also Reed v. National Labor Relations Bd., 927 F.2d 1249, 1252 (D.C. Cir. 1991) ("Exemption 6 protects 'Excelsior' lists [names and addresses of employees eligible to vote in union representation elections] as a category."), cert. denied, 502 U.S. 1047 (1992); SafeCard Servs. v. Securities and Exchange Comm'n, 926 F.2d 1197, 1205-06 (D.C. Cir. 1991) (holding "categorically that, unless access to the names and addresses of private individuals appearing in files within the ambit of Exemption 7(C) is necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity, such information is exempt from disclosure"). Here, by ordering that DOD obtain the detainees' views as an intermediate step before engaging in the balancing required by Exemption 6, the Court rejected the categorical approach in favor of a regime in which disclosure of an unredacted CSRT transcript could constitute a clearly unwarranted invasion of privacy in one case (where the detainee does not consent to disclosure) but not in another (where he purportedly does). In so doing, the Order disregards Supreme Court precedent and thwarts "the congressional intent to provide 'workable' rules" of FOIA disclosure. FTC v. Grolier, 462 U.S. at 27 (quoting Senate and House reports).

The Court also erred in relying on Center for National Security Studies v. United States Dep't of Justice, 215 F. Supp. 2d 94 (D.D.C. 2002), aff'd in part, rev'd in part, 331 F.3d 918 (D.C. Cir. 2003), and War Babes v. Wilson, 770 F. Supp. 1 (D.D.C. 1990), to support its polling directive. See Order at 4, n.1. In Center for National Security Studies, the district court ordered the opt-out procedure only after it had performed the required balancing test, determined that the government had not met its burden of establishing that the detainee names were properly withheld, and ordered disclosure. See Center for National Security Studies, 215 F. Supp. 2d at 106. In War Babes, the Court did not require the government to poll the servicemen, but merely offered it the option of supplementing the record with affidavits from servicemen asserting a privacy interest in their addresses, and stated that absent an affidavit, it would order disclosure as to that particular serviceman. War Babes, 770 F. Supp. at 5. Thus, in both cases, the courts merely qualified their categorical disclosure rulings by allowing interested persons to come forward and opt-out of disclosure if they wished to do so. Neither case provides authority for the procedure imposed by the Court here of requiring DOD to take the affirmative step of polling detainees for the purpose of deciding whether DOD's withholding was proper. See Order at 3.

Both cases, moreover, are at odds with the categorical approach for determining the applicability of FOIA exemptions mandated by Congress and the Supreme Court, including where the determination whether withholding was proper is made by balancing the privacy and public interests at stake. See Reporters Committee, 489 U.S. at 778-780. As such, the Court erred in relying on these non-binding precedents in place of the binding authority of Congress and Supreme Court. Under the categorical approach, if the Court believes that DOD has not met its burden of establishing that disclosure of detainee identifying information would constitute a "clearly unwarranted invasion of privacy" because it did not present evidence of detainees' views on the disclosure, 5 U.S.C. § 552(b)(6), then the appropriate course under FOIA is to order disclosure, not to force DOD to seek out that evidence.[1]

Finally, the Court overlooked that a polling procedure could itself compromise detainee privacy because of the difficulty of maintaining the confidentiality of responses among the detainees. See Second Supplemental Hecker Declaration ¶ 9. No consent procedure, including the one ordered by the Court, can prevent some detainees from pressuring others to reveal whether or not they consented to disclosure, or to change their minds once they have made that choice. See id. ¶ 13. It is also likely that even those who do not consent could be more easily revealed by virtue of their presumably diminished number. In an Exemption 6 case, the D.C. Circuit cautioned against use of individual authorizations (which were not ordered by the court but which the agency offered to accept if the plaintiff obtained them) for exactly these reasons, noting that among the "difficulties inherent" in seeking consent to disclosure of personal information from a group of individuals were that "there may be explicit or implicit group pressure on those few who do not wish to have their lives publicized," and that "if many consented-to disclosures are made, it may become significantly easier to identify the remainder of the group because of the smaller size of the unknowns." Rural Housing Alliance v. United States Dep't of Agric., 498 F.2d 73, 82-83 (D.C. Cir. 1974); see also Federal Labor Relations Authority v. United States Dep't of Commerce, 962 F.2d 1055, 1059 (D.C. Cir. 1992) (Exemption 6 barred disclosure of list of employees who received outstanding performance ratings because, among other things, such a list "reveals by omission the identities of those employees who did not receive high ratings, creating an invasion of their privacy").

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[1] The cases cited by Court also provide no precedent for its polling procedure because in neither case was the court's procedure for obtaining the individuals' views implemented. As noted above, the district's court's order in Center for National Security Studies directing the Department of Justice to disclose the names of individuals arrested and detained in the aftermath of the September 11 attacks was reversed on appeal, and the district court's "opt-out" procedure was therefore never implemented. See Center for National Security Studies v. United States Dep't of Justice, 331 F.3d 918, 932 (D.C. Cir. 2003). The polling of servicemen suggested by the court in War Babes also was never carried out by the defendant agencies due to the parties' settlement of the case following the district court's decision, which was to be vacated under the terms of the settlement. See War Babes v. Wilson, Civil Action No. 88-3633 (TPJ), Stipulation of Settlement and Court Order, dated Nov. 15, 1990 (annexed hereto as Exhibit A); Docket Sheet for War Babes v. Wilson, 88-CV 3633 (D.D.C.), as of September 9, 2005, at 6 (reflecting court's approval of settlement stipulation and order on November 16, 1990) (annexed hereto as Exhibit B).

B. Separation of Powers Principles and the Courts' Traditional Deference to the Executive in Matters of Military Operations Make the Court's Polling Directive Inappropriate Here

Even if it might be appropriate in some Exemption 6 case for the Court to require the government to poll the subjects of the agency records at issue, this is a singularly inappropriate case in which to employ such a procedure, given the separation of powers concerns raised by the Court's Order. Article II of the Constitution vests "[t]he executive Power" of the United States in the President (Art II, § 1, cl. 1), whom it designates as the "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States" (Art. II, § 2, cl. 1). Construing these provisions, the Supreme Court has long held that the President, as Commander in Chief, "is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effective to harass and conquer the enemy." Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1850).

The Supreme Court has expressly recognized, moreover, that "[t]he capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.'" Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2640 (2004); see also Johnson v. Eisentrager, 339 U.S. 763, 774 (1950) ("Executive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to war-time security."). Detention of enemy combatants is thus an integral part of the President's constitutional authority to wage war as Commander in Chief of the armed forces. Detention of enemy combatants captured in military operations undertaken in response to the September 11 attacks was also "clearly and unmistakably authorized" by Congress in its resolution authorizing the President to use military force in response to the attacks. Hamdi, 124 S. Ct. at 2641.

The Court's Order requiring DOD to poll Guantanamo detainees necessarily encroaches on that authority. The relationship between DOD and the detainees is fundamentally a military, and not simply a custodial, relationship. The detainees are enemy combatants who were captured during military operations and are being held during wartime on foreign soil. To require DOD to interact with the detainees -- many of whom "seek to turn to their advantage any action taken by DOD," Second Supp. Hecker Decl. ¶ 4 -- in order to solicit their voluntary consent to disclosure in a private party's FOIA lawsuit unquestionably intrudes on the relationship between the military and the captured enemy combatants. The wording of any detainee notice alone, for example, has the potential to infringe on that relationship in ways harmful to the Guantanamo mission. See Letter of AUSA Elizabeth Wolstein dated September 2, 2005, at 1.

Further, as DOD has explained, the Order not only creates "enormous logistical burdens," but "would require the diversion, to an intolerable degree, of significant resources from the military's primary mission at Guantanamo – conducting detention and interrogation in support of the Global War on Terrorism, coordinating detainee screening operations, and supporting law enforcement and war crimes investigations." Second Supp. Hecker Decl. ¶ 2. Among other things, distribution of any consent notice likely would require DOD personnel to meet privately with detainees, which in turn would require additional security personnel to transfer detainees away from their cell blocks for meetings. Id. ¶¶ 6, 9-10. As DOD has advised the Court,

> Personnel at Guantanamo are already heavily involved in actions related to its detention and intelligence gathering missions. They are also conducting ongoing ARBs [Administrative Review Boards] and are involved with visits by habeas counsel for the detainees. To charge Guantanamo personnel with conducting such meetings [with detainees] would overwhelm their primary responsibilities at Guantanamo and undermine the military's ability to effectively conduct the essential mission of the facility.

Id. ¶ 10.

Compliance with the Court's order would also divert DOD translators and interpreters, which are already in limited supply, thereby compromising key military functions at Guantanamo. See id. ¶ 10 ("Given the high demand for translators for mission-related matters at Guantanamo, taking them away from that work (even part-time, as the diversion would have to be) would have a significant impact on DOD's ability to have its translation needs met in the crucial areas of intelligence and operations."); id. ¶ 12 ("As with translators, DOD has a limited number of interpreters available, and their primary mission is to assist with intelligence gathering and other operational matters.").

The Court's summary dismissal of DOD's uncontradicted evidence of the logistical burdens involved in undertaking a meaningful informed consent procedure as either conjectural or immaterial, see Order at 4 n.1, overlooked the concrete burdens that compliance with the Order would impose on the mission at Guantanamo. See Second Supp. Hecker Decl. ¶¶ 6-12. And contrary to the Court's approach, the views of the Executive Branch concerning the impact of the Order on DOD's military operations are entitled to substantial deference. See, e.g., North Dakota v. United States, 495 U.S. 423, 442 (1990) ("When the Court is confronted with questions relating to military discipline and military operations, we properly defer to the judgment of those who must lead our Armed Forces in battle."); Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (noting, in the context of evaluating whether military needs justified a restriction on religiously motivated conduct, that "courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest"); Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953) ("Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."); Luckett v. Bure, 290 F.3d 493, 497 (2d Cir. 2002) ("'Traditionally, the courts have been quite reluctant to review or intervene in matters concerning the military.'" (quoting Crawford v. Cushman, 531 F.2d 1114, 1120 (2d Cir. 1976)); Jones v. New York State Div. of Military and Naval Affairs, 166 F.3d 45, 50 (2d Cir. 1999) ("[T]he importance of judicial deference in military affairs ha[s] long been recognized."). The courts' traditional deference to the determinations of military officials in operational matters, as well as principles of separation of powers, make reconsideration and vacatur of the Order appropriate here.

CONCLUSION

For the foregoing reasons, the Court should grant DOD's motion for reconsideration of, and vacate, the Court's August 29, 2005 order.

Dated: New York, New York
September 9, 2005

Respectfully submitted,

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